Mid-Wilshire Healthcare Center d/b/a Fidelity Healthcare and Rehab Center *and* SEIU Local 434B, Service Employees International Union, Petitioner. Case 21–RC–20895

June 4, 2007

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 13, 2006, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 45 for and 25 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations for the reasons stated below, and finds that a certification of representative should be issued.

At issue before the Board is the Employer's objection that Housekeeping and Maintenance Supervisor Marlon Dayot "engaged in prounion campaigning, which tainted the environment for a fair election."[2] Applying the standard established in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), we conclude, in agreement with the hearing officer,[3] that Dayot's prounion conduct was insufficient to warrant overturning the election.[4]

Analysis

Applying the two-prong *Harborside* standard, we conclude (1) that Dayot's conduct was not objectionable; and (2) that, in any case, it did not materially affect the outcome of the election here.

1.

The first prong of the *Harborside* standard requires us to consider

> [w]hether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

Harborside, supra at 909.

a.

It is undisputed that Dayot was a supervisor, but not a high-ranking manager. In view of the hearing officer's findings discussed in footnote 2 above, we conclude that Dayot had significant supervisory authority over the 10 employees he supervised; however, these employees comprised a relatively small percentage of the 86 eligible voters.

b.

Considering the nature, extent, and context of Dayot's conduct, we agree with the hearing officer that Dayot's conduct was limited in extent and was not coercive. Dayot spoke in favor of the Union to only one employee, Linda Filimaua (who, at the time, supported the Union),

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] There were no exceptions to the hearing officer's findings that Dayot is a statutory supervisor and that, with regard to approximately 10 housekeeping, maintenance, and laundry employees, Dayot directs their daily duties, disciplines them, hires and fires them, grants time off without consulting with higher level managers, and prepares their work schedules.

[3] We agree with the hearing officer that the evidence failed to substantiate the Employer's allegations that Dayot held meetings of prounion employees in his office; that Dayot bought lunch for prounion employees; and that Dayot locked his office (in which work supplies were stored) to retaliate against employees Linda Filimaua and Mary Smay after they stopped supporting the Union.

We further adopt the hearing officer's findings regarding the Memorial Day barbeque that Dayot attended. The hearing officer found that the evidence did not establish that the barbeque was a union function. However, in so finding, she did not expressly address Manager Steve Cho's testimony that Dayot, referring to the barbeque, admitted attending a "Union function." We conclude that the hearing officer implicitly credited the uncontradicted testimony of employee Olga Rivas (the only witness who attended the barbeque) that it was organized by "coworkers" and their families, that union representatives did not attend the barbeque, that there were no union items decorating the area, and that there was no talk about the Union at the barbeque. We will not reverse the hearing officer's reliance on Rivas' direct factual evidence in favor of Cho's hearsay testimony regarding what appears to be Dayot's subjective impression about the sponsorship of the barbeque.

Finally, we adopt the hearing officer's finding that Dayot's introduction of a schedule for employees' breaks and lunches was not related to Filimaua and Smay's decision to stop supporting the Union. In adopting this conclusion, however, we do not rely on the hearing officer's finding regarding the timing of the schedule change. We agree with the hearing officer that the schedule change applied to all housekeeping employees, not just to Filimaua and Smay, and that Dayot's explanation that he made the change "to cover his ass" does not show that the change was related to employees' views about the Union.

[4] Member Liebman dissented in *Harborside*. Based on her dissenting views, Dayot's conduct was clearly not objectionable. She finds, however, that even applying *Harborside*, Dayot's conduct was insufficient to justify setting aside the election.

and only because she asked for his opinion. While he did not prevent employees from speaking with union representatives during working time,[5] there is no evidence that he took any steps to encourage such conversations or to prevent any employee from engaging in antiunion conversations during working time. And although Dayot allowed a union pen and flyer to remain in his office, there is no showing that the items were his or that he did anything with them.

Finally, although Dayot did stand near the entrance to the polling place for a few minutes, the evidence does not establish that he was speaking to employees waiting to vote, that he was electioneering on behalf of the Union, or that he was monitoring the activity in the polling place.[6]

As a whole, then, Dayot's essentially passive conduct would not reasonably tend to coerce employees or interfere with their freedom of choice in the election.

2.

Under *Harborside's* second prong, we consider

> [w]hether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, supra, 343 NLRB at 909. Even assuming, contrary to our earlier finding, that Dayot's conduct could have interfered with employees' freedom of choice in the election, we find that the Employer has failed to present evidence to show that such conduct interfered to the extent that it materially affected the election's outcome.

a.

Regarding the margin of victory in the election, a shift of at least five votes would be necessary to change the election's result.[7] The Employer has not shown that Dayot's conduct affected five or more voters.

b.

Dayot's conduct was isolated and not widespread itself or part of a widespread prounion campaign among supervisors.

c.

The timing of Dayot's conduct varies. He spoke about the Union with Filimaua 2–3 weeks before the election; he allowed Filimaua and employee Mary Smay to meet with union representatives approximately 2 weeks before the election, according to Filimaua; and it is unclear when the union pen and flyer were present in his office, although Filimaua testified that she photographed the items about 1–2 weeks before the election.[8] Dayot's presence near the door of the polling place occurred during the second shift of the election, but the Employer has not shown that he engaged in any prounion conduct at that time.

d.

Dayot's prounion conduct has not been shown to have been widely known. Dayot's discussion with Filimaua about the Union was not disseminated; there is no evidence that his passive allowance of working time meetings with union representatives was known; and only Filimaua and Smay testified to being aware of the presence of a union flyer and pen in Dayot's office.[9] Further, the Employer has not shown that Dayot's brief (nonelectioneering) presence near the entrance to the polls would reasonably have affected any voters, let alone a determinative number.

e.

None of Dayot's conduct, either separately or in the aggregate, was threatening, intimidating, or otherwise coercive in a manner that would be likely to have a lingering effect on voters. As to the potential mitigating effect of an antiunion campaign by the Employer, the evidence is limited, but we find it sufficient to conclude that the employees would have been aware that the Employer opposed the union campaign.[10]

[5] Because of the informal scheduling of employees' breaks, it is not clear whether Dayot was even aware that these conversations were occurring during employees' worktime.

[6] Because the record contains no evidence regarding Dayot's reasons for being near the polling place, we do not rely on the hearing officer's speculation about Dayot's reason for being there.

[7] As discussed previously, the tally of ballots shows 45 votes for the Union, 25 votes against the Union, and 10 challenged ballots. In accord with the Board's usual practice, we assume that all 10 challenged ballots were votes against the Union. See *Harborside*, supra, at 913 fn. 23.

[8] Filimaua also testified that she did not notice any union items in the office when she asked Dayot about the Union, 2–3 weeks before the election.

[9] Other employees may have seen the union materials, but it is the Employer's burden to make such a showing, and it has not done so.

[10] After the union petition was filed, the Employer held meetings with each department's employees to respond to the petition. In concluding that the Employer, in these meetings, expressed opposition to unionization, we rely on Smay's testimony that a meeting she attended, about a month before the election, was led by "unionbusters," which led her to conclude that the Employer did not want the Union to come in. We do not rely on the hearing officer's speculative assertion that "[i]t is well known that the type of information provided by employers

In sum, considering all of the relevant factors, we find that the Employer, as the objecting party, has not carried its burden of showing that the election was materially affected by Dayot's conduct.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for SEIU Local 434B, Service Employees International Union, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time certified nursing assistants, licensed vocational nurses, activities coordinators, medical records clerk, minimum data sheet coordinator, social service designee, business office manager, housekeepers, laundry workers, dietary aides, cooks, and restorative nursing assistants employed by the Employer at its facility located at 11210 Lower Azusa Road, El Monte, California; excluding all other employees, professional employees, registered nurses, guards and supervisors as defined in the Act.

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during union campaigns are [sic] an attempt to persuade employees not to vote for the union."